

APPELATE PANEL  
OF  
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
FILE NO. 0809635

**DECISION AND ORDER OF THE FULL COMMISSION**

DENISE THOMAS, CLAIMANT,

vs.

NVR BUILDING PRODUCTS/RYAN HOMES, EMPLOYER,

AND

NEW HAMPSHIRE INSURANCE COMPANY, CARRIER,

DEFENDANTS

Filed: 6/24/13

Date of Hearing: Held in Columbia, South Carolina on April 15, 2013.

Purpose of Hearing: To determine all issues as set forth on claimant's Form 30.

Commissioners: Aisha Taylor, Gene McCaskill and Andrea C. Roche.

Appearances: Claimant was represented by Kathryn Williams, Esquire, Greenville, South Carolina.

Defendants were represented by John R. Blythe, Esquire, of Rudisill, White & Kaplan, P.L.L.C., Charlotte, North Carolina.

**RECEIVED**

JUL 26 2013

**SC Court of Appeals**

## STATEMENT OF THE CASE

On September 10, 2009, Commissioner Andrea C. Roche entered a Decision and Order finding as fact and concluding as a matter of law that: on June 30, 2008, claimant sustained an injury by accident causing an exacerbation of a preexisting back and left lower extremity condition; that claimant's severe pre-existing psychological problems were not aggravated by the injury; that claimant's preexisting psychological problems were aggravating pain associated with the fall; that claimant had not reached maximum medical improvement; that claimant was entitled to causally related treatment for the low back and left leg radiculopathy; that claimant had been temporarily totally disabled since July 1, 2008; and that claimant was entitled to temporary total disability compensation at \$640.19 per week until further order of the Commission. On February 25, 2010, the Full Commission affirmed Commissioner Roche's Decision and Order in its entirety.

On January 4, 2011, Commissioner Beck entered a Decision and Order finding as fact and concluding as a matter of law that: claimant sustained an injury by accident to her back and left leg (radiculopathy) arising out of and in the course and scope of her employment with defendant-employer; that claimant sustained a 40% permanent partial disability to the back (with the rating accounting for radiculopathy in the left leg and increased pain resulting from her pre-existing [non-compensable] psychological condition); that claimant is entitled to causally related future medical care for the low back and radiculopathy in the left leg; and that defendants are entitled to credit for temporary total disability compensation paid since August 9, 2010, the date of filing of the Form 21.

Claimant filed a Form 30, Request for Commission Review, (and an Amended Form 30)

appealing Commissioner Beck's January 4, 2011, Decision and Order to the Full Commission. On August 16, 2011, the Full Commission remanded the case to Commissioner Beck to address whether claimant was entitled to benefits under S.C. Code § 42-9-20. The Full Commission also amended Commissioner Beck's January 4, 2011 Decision and Order to award the allocation of the award pursuant to James v. Anne's, Inc., 701 S.E.2d 730 (S.C. 2010), and to amend the Commissioner Beck's Finding of Fact 19 to use the word "direct" instead of "control."

On November 10, 2011, Commissioner Beck filed a Decision and Order wherein he affirmed his Award and that claimant was not entitled to a wage loss award under S.C. Code § 42-9-20, or any other section of the Act.

On November 23, 2011, claimant filed a Form 30, Request for Commission Review, appealing Commissioner Beck's November 10, 2011, Decision and Order to the Full Commission. The Appellate Panel again remanded the case, this time to Commissioner Susan S. Barden.

On November 26, 2012, Commissioner Barden issued an Order wherein she determined, *inter alia*, that "Claimant has failed to, in the light of the records and testimony as a whole, prove the merits for a wage loss award pursuant to S.C. Code § 42-9-20. Therefore the award of 40% to the back issued by Commissioner Beck stands and is wholly affirmed." (Barden Decision & Order, p. 12.)

Within the statutory period, counsel for Appellant filed a Form 30, Request for Commission Review, copies of which were furnished to all interested parties, prior to oral argument which was held before the Appellate Panel on April 15, 2013. All proper testimony has been taken. Such, together with all documentary evidence, has been delivered to the

individual members of the Full Commission and has since been under study and careful consideration.

In an Appellate Review, the Panel shall, pursuant to S.C. Code § 42-17-50 (1985), review the award, weigh the evidence as presented at the initial hearing and, if good grounds are shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. After careful review in the instant case, the Full Commission, by unanimous vote, has determined that all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated. Accordingly, they shall become, and hereby are, the law of the case and therefore, the Order is sustained in its entirety. The Hearing Commissioner's decision is incorporated by reference as if set forth verbatim herein, to wit:

#### FINDINGS OF FACT

1. Through remand, the Full Commission Ordered that an analysis of a potential wage loss award pursuant to S.C. Code § 42-9-20 be made by the jurisdictional Commissioner (i.e., the undersigned).

2. Further, through remand, the Full Commission ordered that the undersigned's Decision & Order be amended to award the allocation of any award pursuant to James v. Anne's, Inc., 701 S.E.2d 730 (S.C. 2010), and that the Finding of Fact Number 19 is amended to use the word "direct" instead of "control."

3. Through remand, the Full Commission ordered that an "analysis of the merits of a wage loss award" pursuant to Section 42-9-20 be made by the jurisdictional commissioner (i.e., the undersigned).

4. Neither party submitted or requested to submit any vocational or other evidence as to partial wage loss, and instead chose to rely on the submissions already in evidence. The Full Commission specifically requested the undersigned to consider the merits of a Section 42-9-20 analysis (e-mail as contained in the Commission's file; Order of the Full Commission, dated July 2012).

5. When the undersigned's assistant attempted to schedule a hearing in this matter, both parties stipulated that testimony was unnecessary for purposes of the remand. Therefore, no hearing was held before the undersigned (e-mail as contained in the Commission's file).

6. After reviewing all the evidence, the undersigned is unable to locate any vocational evidence speaking to the specific issue of partial wage loss. Instead, Claimant relies on her previously-submitted vocational report, and contends that she is permanently and totally disabled, or alternatively that she has sustained significant wage loss.

7. Commissioner Beck awarded 40% to the back (to encompass any radiculopathy) pursuant to Section 42-9-30(21). Defendants contend that Claimant is not permanently and totally disabled, in accordance with Commissioner Beck's Order. The Full Commission affirmed Commissioner Beck's Award of 40% permanent partial disability to the back. (Order of Commissioner Beck, dated November 2011; Full Commission Order, dated July 2012; Finding of Fact #17).

8. Again, my specific charge from the Full Commission is a consideration of the merits of a wage loss analysis (specifically) as to Section 42-9-20. The order also states, as written by Claimant's counsel, that all other issues are preserved on appeal. Therefore, I believe and find that I am also compelled to (a) determine whether there is wage loss pursuant to Section

42-9-10 (as wage loss was not addressed in Commissioner Beck's order), (b) consider Claimant's 42-9-35 argument as well, although Commissioner Beck's Order and the Full Commission's Order both specifically state that the 40% award is to encompass "increased pain" from Claimant's pre-existing psychological condition, (c) consider Claimant's request for a lump sum, and (d) consider Claimant's request for a separate award to the leg.

9. Claimant did not undergo surgery, as her objective studies revealed no surgical pathology (medical evidence in its entirety, including but not to Claimant's MRI).

10. Claimant has sedentary restrictions, but they more than appear to the undersigned to be based upon Claimant's subjective complaints to treating physicians. I base this finding on the fact that Claimant's objective findings (MRI) do not show lumbar pathology ("mild" stenosis "without involving the exiting nerve roots," mostly a "shallow" protrusion with no compression, and no appreciable difference between Claimant's pre-accident MRI and her post-accident MRI) which would warrant the use of a cane, walker, or crutch (as Claimant has used with her providers); there is no evidence that any of these devices were prescribed for Claimant (See Claimant's APA, page 253; 288; Claimant's APA, page 301), in which it is noted that Claimant used a crutch at her visit with psychiatrist-evaluator Dr. Mullen. Nonetheless, even embracing Claimant's restrictions without question, I find that Claimant (described as "very well educated") has a Master's Degree in guidance and counseling, and a Bachelor's degree in sociology. At some point, Claimant attended an all-French school. Further, Claimant has (a) worked as a regional sales manager (generating 20 million dollars a year for her assigned account), (b) successfully sold advertising in the Yellow Pages, (c) sold real estate (4 years), and (d) formerly owned her own clothing store, which she ultimately closed because of an ill

parent—not because her business failed (testimony of Claimant as contained in the Transcript of Hearing before Commissioner Beck, pages 9-12 and 28-29; Claimant's APA, pages 182, 282, 288, 291-292, and 298-299; Defendants' APA, pages 130-131, 133, and 137).

11. Claimant's intellectual functioning is characterized in the "average to high-average," based upon Claimant's vocabulary usage and overall presentation at an evaluation (Claimant's APA, page 284).

12. Even Claimant's own vocational expert tests Claimant's word reading at a 12.5 grade level. Given Claimant's prior job experience/responsibilities as referenced *supra*, I cannot help but question a 4.5 grade math score, particularly when Claimant testified at Commissioner Beck's hearing that she has experience dealing with significant sums of money and has never (including now) had trouble doing so (Claimant's APA, page 292; Transcript of Hearing before Commissioner Beck).

13. Commissioner Beck did not find that Claimant sustained a 50% or greater loss of use of her spine. He awarded 40% to the back to encompass any radiculopathy Claimant may have. Claimant contends that a separate award should have been made to the leg. Given the fact that no physician—at least not Drs. Bruce (Claimant's own expert), Rollins, or Scott—has found objective evidence of radiculopathy, I likewise decline to make a separate award to the leg: (a) Claimant's own expert (Dr. Bruce) **could not find any objective evidence of radiculopathy when he examined Claimant**; (b) Dr. Rollins likewise found "no objective evidence" of nerve damage in either leg; (c) Dr. Scott noted negative straight leg raising without a clear-cut dermatomal sensory deficit; (d) Dr. Holdren found negative straight leg raising; (e) on October 2009 and August 2010, Claimant's muscle strength bilaterally was 5/5 with no atrophy; (f)

Claimant's gait is noted to be improved in August 2010. Other later visits show improved mobility. I therefore find that Claimant's leg condition is not significant, but rather minor and peripheral. Nonetheless, with the leg as a second body part, my charge is to consider the merits of a wage loss claim (Order of Commissioner Beck; Full Commission Order; medical evidence including but not limited to Claimant's APA, pages 247, 259, 263-264, and 306; Defendants' APA, pages 131 and 137).

14. I considered Claimant's argument that Section 42-9-35 applies such as to render Claimant permanently and totally disabled. However, Claimant is **inconsistent in salient ways** which call into question the veracity of her complaints/statements/testimony: (a) Claimant's statements to providers that she has **gained significant weight (35 lbs. to one provider, and 40 lbs. to another provider)** since the date of the accident are refuted by medical evidence. In fact, Claimant weighed 188 just a few days after the date of the accident, and now weighs 175 (report of Randy Adams)—a weight loss of 13 lbs. An alleged 35-40 lb. weight gain versus an actual 13-lb. weight loss speaks for itself regarding significant exaggeration. However, I further note that for someone who allegedly "can't move at all" and lies in bed most of the day (as Claimant's presentation and statements to providers are documented), a 13-lb. weight loss would be remarkable (Claimant's APA, pages 154, 289, 291, and 298-299; Defendants' APA, pages 55); (b) Claimant states in her testimony that as to leg pain, "it's *usually* my left leg," but then almost immediately and inconsistently states "my right leg hasn't given me any problem so far" (Transcript of Hearing before Commissioner Beck, page 33); (c) Claimant states that she does stretches on a "good day," but then inconsistently states that she only has "bad days and very bad days" (Claimant's APA, page 291); (d) Claimant will admit to driving 2-3 times a week ("does

drive short trips around town” according to Dr. Mullen), but inconsistently states that she does not get out much “because of my condition;” (e) Dr. Scott points out that Claimant required assistance to move on and off the examining table, yet was independent in rising and sitting in a chair; and (f) as to previous history of anxiety or depression, Claimant told ER physicians that she had none.

15. Contrary to Claimant’s statement to Dr. Mullen that Claimant “cannot move” and has no real interest in anything other than lying in bed, Dr. Harper (a psychologist evaluating Claimant for a “mental status examination”), noted Claimant to be “impeccably groomed” with manicured/painted nails and colored hair, wearing a lot of jewelry, attired in designer apparel, and “wearing makeup including red lipstick.” This finding is not dispositive of anything, but simply shows that Claimant has not “given up” on her appearance, particularly for a person in allegedly severe pain and with allegedly significant and “severe” depression. Claimant’s appearance was such that even Dr. Mullen felt compelled to note Claimant’s “skill at makeup.” Claimant told Dr. Mullen that prior to the date of injury, she was “very much into fashion,” which does not appear to have changed much, judging from a combination of Dr. Mullen’s and Dr. Harper’s descriptions. In June 2009, Claimant listed her activities to medical providers as “going to the store” and “getting her nails done.” In August 2010, Claimant listed her activities as “shopping” and going to doctors’ appointments. Claimant reported that prior to the injury, she would go on shopping sprees (Claimant’s APA, pages 232, 261, and 283-284).

16. Dr. Scott recommended that Claimant increase ambulation (Defendants’ APA, page 138).

17. Claimant's testimony--that her unrelated neck condition is not worse than her admitted lumbar spine condition—is refuted by (a) her statement to her own vocational expert; (b) the objective evidence as shown on Claimant's cervical MRI which shows cord compression and "severe" facet arthropathy; Claimant complained of "extreme" neck pain to her physician. By contrast, Claimant's lumbar MRI shows a protrusion; and (c) her statement that her neck and left knee "have been hurting worst lately" (Transcript of Hearing before Commissioner Beck, page 35; Claimant's APA, pages 165, 253, 256, and 280-281; Defendants' APA, page 104).

18. More than one provider has noted that Claimant's pain behaviors are "exaggerated in context of disease," "significant," "somatically focused," and "quite dramatic" (Claimant's APA, pages 252, 258, and 284).

19. Claimant's testimony that Dr. Scott told Claimant that her condition would get increasingly worse is not supported by any medical record or any objective evidence (testimony of Claimant as contained in Hearing Transcript, page 31).

20. I note that Claimant's vocational expert tests her in the 1<sup>st</sup> percentile as far as the Perdue Pegboard is concerned. In January 2009 (post-accident), Claimant is noted to be "getting more pain in both of her hands and wrists" (perhaps because of Claimant's pre-existing/unrelated fibromyalgia or neck condition or lack of effort). **Neither Claimant's fibromyalgia or neck is related to Claimant's injury** (Claimant's APA, page 197 and 292).

21. Claimant's drug test for prescribed Lortab was negative in June 2009, as Claimant was only taking it "PRN" (Claimant's APA, page 230).

22. By January 2010, Claimant reported that her medications were working well and that she was tolerating them well (Claimant's APA, page 256).

23. Claimant drives 2-3 times a week, and drove to her mental status examination. She also drives to the store (Claimant's APA, pages 282-284, 288, 290-291, and 299).

24. Contrary to Dr. Scott's misapprehension, it is not "academic" that because Claimant has secured Social Security Disability that she is limited to sedentary work or restricted from working. Social Security Disability and workers' compensation utilize entirely different standards. Further, Claimant has pre-existing and unrelated (a) fibromyalgia (shown to be worsening prior to the accident), (b) neck ("severe") problems, and (c) psychological issues which were denied (Defendants' APA, page 132).

25. Claimant may have been working on the date of the accident, but medical evidence from the months prior to the date of the accident are telling (Defendants' APA submissions).

26. Claimant's psychological condition was denied by Commissioner Roche (Commissioner Roche found that it was not compensable condition, but that it made Claimant's pain worse), a finding reiterated by Commissioner Beck in his Orders dated January 4, 2011 and November 10, 2011. Commissioner Beck's award encompasses any increased pain from Claimant's pre-existing psychological condition, a finding affirmed by the Full Commission. The undersigned would make no additional finding in this regard (Finding of Fact #17, as contained in Commissioner Beck's Order; Full Commission Order, dated July 2012, Finding of Fact #17).

27. I do not give a lot of weight to the psychiatric opinion of Dr. Mullen, as there is other substantial evidence to refute/contradict his conclusions. Dr. Mullen's opening remarks that when Claimant reached the bottom of the hill, her life had "completely changed." In fact,

voluminous medical records show Claimant was already being treated for a 20-plus year history of chronic spinal pain (including "extreme" neck pain); fibromyalgia; insomnia (for which Claimant was taking Ambien on the date of the accident--Claimant's APA, page 155; Defendants' APA, pages 1-2); fatigue; memory problems; and other maladies (medical evidence in its entirety including but not limited to Claimant's APA, page 297; Defendants' APA submissions). Dr. Mullen's statements that Claimant "can't move at all," Claimant has an "inability to move," and that Claimant was "hunched over" on his couch during the entire interview" are hyperbolic statements (either his own or Claimant's), as there is no lumbar pathology to support such contentions. Further, I give little weight to Dr. Mullen's statement that Claimant—to whom makeup and personal hygiene have remained "very, very important" to her—"*looks better than she really feels,*" as outcome determinative, result-oriented, or at least questionable (Defendants' APA #3, #4, #5, #6, #7, and #8 in their entirety including but not limited to pages 72, 104, 108, 114, 125, and 130; Claimant's APA #23).

28. I do not find it dispositive that Claimant has not performed any counseling work in 30-35 years. Many people (such as Claimant) successfully engage in vocations (such as sales) wholly unrelated to their undergraduate and master's degrees (Transcript of Hearing before Commissioner Beck, page 10).

29. Claimant is not permanently and totally disabled. I think that Dr. Bruce's qualifying phrase "*as this patient presents today*" correlates with my other findings herein (Claimant's APA, page 307).

30. I considered Claimant's vocational report, but find that the objective evidence far outweighs the report's conclusions, which I find to be largely (almost wholly) based upon Claimant's subjective complaints.

31. Defendants are entitled to credit for temporary total disability compensation paid since August 9, 2010, the date of filing of the Form 21 (Order of Commissioner Beck).

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32. The 40% award encompasses any radiculopathy and increased pain result from Claimant's pre-existing (non-compensable) psychological condition.

33. Claimant did not present any additional evidence with regard to a lump sum. I do note that Claimant herself reported that she was "notorious for going on in impulsive shopping sprees" when she had money. She also told Dr. Harper (in a psychological evaluation) that she has "lately" forgotten to pay bills for which she was responsible. **Claimant cannot have it both ways—she describes alleged memory problems as a reason she cannot work, but inconsistently states that she would have "no problems" handling large sums of money.** Therefore, other than a partial lump sum for attorney fees, the issue is held in abeyance for a future hearing unless otherwise agreed to by the parties. See Claimant's APA, page 283.

34. I considered the conclusions of providers who state that Claimant is unable to work, but find that these conclusions are based upon Claimant's subjective complaints and presentation to these providers. For instance, Dr. Harper (who states that Claimant cannot work) describes the "fact" that Claimant is withdrawn socially because Claimant is "embarrassed" about "how much weight she has gained" since the date of the accident. Since Claimant has, in fact, **lost weight since the date of the accident**, Dr. Harper's "conclusion" is illusory. Based upon the report, it is readily apparent to the undersigned that Dr. Harper never read Claimant's

prior medical records. Instead, I find that the objective evidence and inconsistencies in this case (some of which are noted herein) speak far more loudly than the conclusions of experts who rely on subjective statements/complaints (*e.g.*, Claimant's APA, page 283).

#### CONCLUSIONS OF LAW

1. Amount of compensation for permanent partial disability is governed by S.C.

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Code § 42-9-20.

2. Allocation for prorating a lump sum award over life expectancy is governed by James v. Anne's, Inc., 701 S.E.2d 730 (S.C. 2010).

#### AWARD

1. As the Findings of Fact recited above reveal, the Claimant has failed to, in the light of the records and testimony as a whole, prove the merits for a wage loss award pursuant to S.C. Code § 42-9-20. Therefore, the award of 40% to the back issued by Commissioner Beck stands and is wholly affirmed.

2. Any prior Order is to include the language that medical treatment is to be pursuant to S.C. Code § 42-15-60.

3. Should there be no appeal of this ruling within the statutory and regulatory time frames allowed, the Claimant shall submit a "*Utica-Mohawk*" distribution for the underlying award no less than ten days from expiration of said date. Same shall be submitted in the form of a proposed Amended Order, to be filed with the office of the undersigned, with a copy being sent to opposing counsel.

IT IS, THEREFORE, ORDERED that the Order of Commissioner Barden filed in the above-captioned matter on November 26, 2012, is hereby affirmed by the Appellate Panel and the same shall constitute the Decision and Order of the Appellate Panel.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

  
Aisha Taylor, Commissioner

FULL AFFIRMATION

CONCUR:

  
Gene McCaskill, Commissioner

  
Andrea C. Roche, Commissioner

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

**By Valerie Deller on June 24, 2013**